



LEGAL LIABILITY OF ORGANIZATIONS FOR MENTAL INJURY IN CANADA

*The duty to provide and maintain a psychologically safe workplace is expressed and acted upon in different ways across the country (Canada) and in different branches of the law, but the unmistakable common thread is the increasing insistence of judges, arbitrators and commissioners upon more civil and respectful behaviour in the workplace and avoidance of conduct that a reasonable person should foresee as leading to mental injury.*¹

Increasingly, occupational health and disability insurance statistics are indicating a growing proportion of mental health illnesses relative to all occupational illnesses and injuries. This has resulted in more and more employees pursuing various avenues, including litigation, to seek compensation from their current or former employers for mental injury. In a 2009 report, [Stress at Work, Mental Injury and the Law in Canada](#), Dr. Martin Shain (University of Toronto), an academic lawyer and leading expert in workplace mental health issues, illuminated a dramatic evolution of the employee-employer relationship, stressing that employers who fail to understand this growing legal terrain are at serious risk of liability.

In [Tracking the Perfect Legal Storm](#), a subsequent report by Dr. Martin Shain prepared for and released by the [Mental Health Commission of Canada](#) (MHCC) in September 2010, he concludes that employers are confronted with a legal duty to maintain not only a physically safe workplace, but also a *psychologically safe workplace*.²

According to Dr. Shain in this most recent report, the pressures of the modern workplace can lead to common mental health conditions, such as depression, debilitating anxiety and burnout, which in turn can be characterized as mental injury. Courts and tribunals are now scrutinizing behaviour that may cause mental injury to employees. Legal actions are consequently being taken in several key areas of law, including the law of torts (common law), human rights, workers compensation, occupational health and safety, employment standards, and those elements governing employment contracts. These factors are converging to form what Dr. Shain calls a 'perfect legal storm'.³

Rise in work-related mental illness and injury

*Mental illness is linked to more lost work days than any other chronic condition, costing the Canadian economy \$51 billion a year in lost productivity, a new report shows. Researchers at the [Centre for Addiction and Mental Health](#) (CAMH) looked at the cost of mental health leaves from employers' point of view and found that covering a mental health leave costs companies twice as much as a short-term physical disability leave. For every 1,000 Canadian employees, 145 short-term leaves are taken annually and about 20 of those are related to mental health, the study found.*⁴

¹ *Tracking the Perfect Legal Storm*: Dr. Martin Shain, Mental Health Commission of Canada, May 2010

² *News Release*: Mental Health Commission of Canada, September 30, 2010

³ *Ibid*:

⁴ *Mental health leaves cost Canadian economy \$51 billion: study*: Carmen Chai, Postmedia News, September 9, 2010

The role of cumulative stress in contributing to workplace mental illness/injury has been well documented in recent years, such that governments and private sector organizations have launched various campaigns to promote mental wellness in the workplace. Bodies such as the Council on Workplace Health and Wellness of the [Conference Board of Canada](#), the [Canadian Alliance on Mental Illness and Mental Health](#) and the [Global Business and Economic Roundtable on Addiction and Mental Health](#) have promoted a greater awareness of mental health issues within Canadian industry and the negative impact of mental illness on organizational performance, communities and society at large.

The direct connection between post-traumatic stress disorder (PTSD) and mental illness, such as depression and debilitating anxiety, is well known. Less well known is the emerging connection between chronic or cumulative stress and mental health. In 1995, the [World Health Organization](#) asserted that psychosocial problems at work, including symptoms of stress, would be the most common occupational health problem in the industrialized countries in the latter part of the 1990s.⁵ Researchers have gone on to note that, as social animals, failure to achieve social needs, high self-esteem and self-actualization can lead to elevated levels of stress. This situation in turn can then culminate in signs and symptoms related to varying degrees of psychosocial illnesses such as debilitating anxiety, clinical depression, paranoia, apathy, emotional fatigue, sadness, mood swings, hypersensitivities, irritability, hopelessness, etc. These illnesses will then affect one's behavioural traits in both one's work and personal life. They could ultimately manifest in behaviours negatively affecting self-esteem, eating habits, personal hygiene, rates of absenteeism and presenteeism, family/work relationships, job performance, substance abuse, sense of responsibility and accountability, etc. In addition, if mental illnesses are left unchecked and worsen over time, and if the psychosocial hazards and stressors are not dealt with, there could be severe and incapacitating results. Physical illness associated with resulting cumulative stress reactions include heart disease, asthma, chronic fatigue syndrome, muscle tremors, neurological damage, and on and on. In some instances, failure to address psychosocial illnesses can lead to suicide and even extreme violent behaviour, occasionally surfacing within the workplace itself. Besides the tragic human consequences, the results will also affect an organization's bottom line, employee morale and general performance.

Indeed, it is estimated that between \$2.97 billion and \$11 billion per annum could be saved by discretionary modifications to the organization and management of work to make it less injurious to employee mental health, with corresponding gains to productivity, efficiency and social capital.⁶

Employers may be legally on the hook for mental injury

Unions and injured worker activists in Canada have asserted for years that denying compensation for most types of mental stress is unconstitutional. They have argued that the *Canadian Charter of Rights and Freedoms* prohibits a compensation agency from treating mental stress claims differently than physical injuries. In what could be a precedent setting case across the country, the British Columbia Court of Appeal partly accepted this argument in the 2009 *Plesner Case*⁷. On judicial review to the BC Court of Appeal, the majority held that the "traumatic event" descriptor under section 5.1 of the province's *Workers Compensation Act*, when reviewed concurrently with board policy, breached the equality provisions of the *Charter* in that it gave rise to discrimination on the basis of mental disability.⁸ Whether employees ought to be entitled to receive workers compensation benefits for cumulative mental stress conditions has been controversial for many years. For example, as a matter of law, Ontario's [Workplace Safety and Insurance Board](#) will grant entitlement only for mental stress that arises

⁵ *Global Strategy on Occupational Health for All (The Way to Health at Work)*: World Health Organization, 1995

⁶ *Stress at Work, Mental Injury and the Law in Canada*: Dr. Martin Shain (Mental Health Commission of Canada, February 21, 2009) p. 5

⁷ *Plesner v. British Columbia Hydro and Power Authority*, 2009 BCCA 188 (B.C.C.A.)

⁸ *Mental health claims: are the floodgates opening?*: Ryan J. Conlin, (Accident Prevention e-News, Industrial Accident Prevention Association, Volume 4/Issue 10/Oct 2009)

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out of a reaction to an unexpected traumatic event or series of events. Workers are not entitled to benefits for traumatic mental stress that results from an employer's decisions or actions. Nor are workers who develop mental stress gradually over time, due to general workplace conditions. It is clear from the decision in the *Plesner Case* that entitlement to workers' compensation benefits for mental stress will expand significantly in BC, and possibly across the country if this decision is followed by other courts or is accepted by the Supreme Court of Canada.⁹

As noted by Dr. Shain in [Tracking the Perfect Legal Storm](#), there have been several court cases in other provinces involving judgements with respect to workers compensation, human rights law, the Common Law of torts, employment contracts, grievance processes as prescribed by labour laws and occupational health and safety legislation. In addition, most jurisdictions now regulate under occupational health and safety and labour laws with respect to workplace violence and harassment, which can contribute to mental injury if not adequately dealt with by the employer. For example, The regulation of harm to mental health under the auspices of employment standards has been prominently addressed in the province of Quebec where jurisprudence on the scope and extent of harassment and moral injury continues to evolve and to become much more sophisticated.

What can organizations do to protect themselves from potential mental injury litigation?

Like any other occupational health and safety matter, organizations can implement a number of policies and practices to reduce the possibility of mental injury to their employees and the potential for non-compliance with human rights, labour laws and various forms of litigation by injured workers. Some of the suggested components for consideration are:

1. *Determine and assess psychosocial hazards and risks within each work site:* There are numerous possible stressors within an organization and within its workplaces that could be potentially harmful to employees' mental health. An assessment of existing working conditions needs to be undertaken to deal with chronic stressful situations that could eventually lead to burnout, debilitating anxiety and depression. Stressors could include work overload, long hours, lack of vacation time, inordinate work-life imbalance, violence and harassment, discrimination, unsafe work practices, inadequate training, lack of support services, limitations blocking career advancement, and lack of impartial, fair and timely means for redress of complaints.
2. *Implement appropriate preventative policies and practices to address psychosocial hazards:* As in the case of physical hazards, organizations need to ensure that the appropriate preventative policies and practices are in place to prevent possible employee mental illness and injury. Managers and supervisors must be held fully accountable to ensure that practices are carried out in accordance with existing organizational policies. In their daily performance, employees in turn must also be held accountable for following the practices as outlined by policies and programs. Where such policies and practices are not being respected, employees must feel free to raise their concerns with management without fear of reprisal.
3. *Institute a fair and transparent system for employee redress in the case of individual or group complaints or concerns:* Individuals or groups of employees need to be able to bring any work-related complaints or concerns to the attention of management without fear of possible reprisal by management or co-workers. Redress mechanisms need to be perceived by all as being objective, fair and transparent. Concerns or complaints must also be addressed in a timely and appropriate manner by the redress mechanism.
4. *Take into consideration existing individual health concerns in a confidential manner.* As in the case of physical health considerations, any individual mental health issues must be dealt with in a confidential manner in order to accommodate individual attributes or concerns. This may

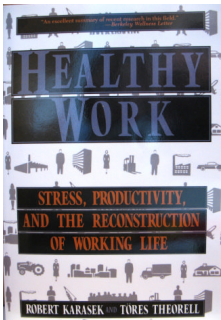
⁹ Ibid:

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often require third-party (usually a medical practitioner) intervention and assessment on a confidential basis in order to ascertain the best means for work-related accommodation.

5. *Provide employee assistance where a mental health concern emerges:* Where a person is experiencing a mental health concern as the result of employment conditions and/or external factors, individuals should have confidential access to internal/external employee assistance programs and/or community health services. Preventative assessment and treatment may help individuals and prevent a worsening of the mental health condition. Contributing work-related stressors to the condition should also be identified and addressed in a timely fashion.
6. *Institute return-to-work policies and practices to accommodate injured workers:* Where an employee must take time off work due to mental health concerns, the organization should have in place appropriate return-to-work policies and practices. From day one of a person's absence, a plan should be developed, in consultation with the immediate supervisor, affected employee and medical practitioners, to lay out a possible return-to-work time frame and employee accommodation. Constant monitoring and progress reports of the employee's status need to be carried out as part of the plan in order to make required adjustments in a timely fashion.
7. *Accommodate injured workers in fair and transparent manner upon their return-to-work:* Having an assessment of the injured worker's condition and needs, organizations need to accommodate his/her return-to-work in an appropriate manner and through on-going consultation. This approach should ensure that any negative factors or stressors contributing to the mental health condition are taken into consideration as part of the accommodation achieved.
8. *Ensure adequate orientation and training of supervisory staff in policies and procedures:* Policies or procedures, especially those regarding return-to-work and dismissal, are only effective through their implementation by motivated and well trained supervisory staff. In turn, supervisors need to make certain that all employees are aware of applicable policies and procedures, and of available employee assistance programs.

Recommended Reading:



“Healthy Work”

(Stress, Productivity, and the Reconstruction of Working Life))

by Robert Karasek and Töres Theorell

(Basic Books, New York, NY, 1990)

- ☞ [Stress at Work, Mental Injury and the Law in Canada](#): Dr. Martin Shain (Mental Health Commission of Canada, February 21, 2009)
- ☞ [Tracking the Perfect Legal Storm](#) (Converging systems create mounting pressure to create the psychologically safe workplace): Dr. Martin Shain (Mental Health Commission of Canada, May 2010)
- ☞ [A Guide to the Business Case for Mental Health](#): European Network for Workplace Health Promotion, 2009

Recommended Web Sites:

- ◆ Centre for Addiction and Mental Health (Canada): <http://www.camh.net/>
- ◆ Mental Health Check - European Network for Workplace Health Promotion: <http://www.enwhp.org/enwhp-initiatives/current-initiative-work-in-tune-with-life/mental-health-check.html>
- ◆ Canadian Institute of Stress: <http://www.stresscanada.org/>

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